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COURT OF CRIMINAL APPEALS
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NO. PD-1089-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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CHARLES LYNCH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

STATE'S BRIEF IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS IN HOUSTON
NO. 01-17-00668-CR

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STATEMENT REGARDING ORAL ARGUMENT

This Court has not granted oral argument in this case, and the State maintains that oral argument should not be necessary to address the issues in this case. The law and the facts are not complicated.

NO. PD-1089-20

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

CHARLES LYNCH, The appellant
V.
THE STATE OF TEXAS, Appellee

From the Court of Appeals for the
First District of Texas
In Houston, Texas
No. 01-17-00668-CR

STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

Now comes Jack Roady, Criminal District Attorney for Galveston County, Texas, and files this petition for discretionary review for the State of Texas.

The one-volume Clerk's Record is referred to in the State's Brief as "C.R. page". The Reporter's Record is multiple volumes and is referred to as "R.R. volume number: page".

STATEMENT OF THE CASE

The State charged the appellant, Charles Lynch, with committing the felony offense of possession of a controlled substance with the intent to deliver (C.R. 5). In an enhancement paragraph, the State alleged that the appellant was previously convicted of the felony offense of delivery of a controlled substance (C.R. 5, 42). The appellant entered a plea of not guilty to the charged offense (C.R. 50; R.R. 2-14, 153) and a plea of true to the allegation in the enhancement paragraph (R.R. 5-9). After the jury found the appellant guilty as charged in the indictment (C.R. 66, 68; R.R. 4- 65), the trial court made a finding of true as to the allegations in the enhancement paragraph and assessed the appellant's punishment at 45 years in prison (C.R. 68; R.R. 5-26-27). The appellant timely filed a written notice of appeal (C.R. 75).

STATEMENT OF THE PROCEDURAL HISTORY

On October 13, 2020, in a published opinion, the First Court of Appeals held that the trial judge abused her discretion at the guilt/innocence stage of the trial by admitting into evidence two of the defendant's prior narcotics convictions. *Lynch v. State,* 612 S.W.3d 602 (Tex. App.—Houston [1st Dist.] 2020, pet. granted). This Court granted the State's petition for discretionary review on February 3, 2021. The State now timely files its brief in support of its petition for discretionary review in accordance with TEX. R. APP. P. 70.1.

STATEMENT OF FACTS

The Search of the Appellant's Residence

On September 23, 2015, officers with the La Marque Police Department went to the appellant's residence in order to execute a narcotics search warrant and an arrest warrant for the appellant (R.R. 3-21-23). The appellant's residence was a converted garage that had been made into a one-bedroom apartment (R.R. 3-25). It was less than 1,000 square feet in size (R.R. 3-25). The residence had a large window at the front, and two women inside the residence could see the officers as they approached the residence (R.R. 3-23). The officers called out, "Police. We have a search warrant." (R.R. 3-23). No one responded, so the officers had to force entry into the residence (R.R. 3-23). There were four people inside the residence—the appellant, Tina Moreno, Norma Myers, and Phillip Darden (R.R. 3-23, 42-43, 71). Ms. Myers was Ms. Moreno's mother (R.R. 3-112).

Based upon the officers' investigation, they believed that the appellant was the only permanent resident of the one-bedroom apartment (R.R. 3-24-25, 42, 71). "Everybody else was visiting in some form or fashion." (R.R. 3-24). The officers briefly spoke with the appellant, and he said that all of the occupants of the residence also lived at the residence (R.R. 3-25, 111). All of the occupants of the residence also told the officers that the appellant lived at the residence with at least one of the other occupants (R.R. 3-71 113-14). All individuals said that Ms. Moreno lived at the

residence (R.R. 3-113-14, 121). The officers had been investigating the appellant's residence for approximately six months, and during that time, the officers never saw Ms. Moreno living at the appellant's residence (R.R. 3-81, 105, 114-15). After briefly speaking with the occupants of the residence, the officers searched the residence (R.R. 3-26).

A search of the appellant's residence revealed that there was a dresser in the single bedroom, and it was located to the right of the bed (R.R. 3-26, 42, 44, 48; State's Exhibit # 14). On top of that dresser, there were off-white, rock-like substances, and the largest of the substances was located in plain view on top of the dresser next to a pouch (R.R. 3-29, 44; State's Exhibits # 15, # 25). The officers suspected that these substances were illegal narcotics (R.R. 3-29, 44-45). Specifically, the officers were aware that crack cocaine was an off-white, rock-like substance (R.R. 3-56). It is hard to the touch, but will crumble into smaller pieces when it is cut (R.R. 3-56).

Close to the larger, rock-like substance, there was a small knife that had more of the rock-like substance on it (R.R. 3-44-45, 74-75; State's Exhibits # 16, # 18, # 25). The officers knew that a knife was often used by street-level narcotics dealers to cut down a large rock of crack cocaine into smaller portions for ultimate sale (R.R. 3-45). There were small crumbles of the rock-like substance all around the knife and on top of the dresser (R.R. 3-45). Located next to the knife, there was a large amount of

cash tied together with a $100.00 bill on the outside (R.R. 3-29, 45). Another smaller rock-like substance had been placed on top of a cell phone that was on the dresser (R.R. 3-29, 45-47; State's Exhibits # 17, # 22). Ms. Moreno told the officers that this cell phone belonged to the appellant (R.R. 3-116); however, the officers were not able to search the contents of that cell phone (R.R. 3-60, 135-36).

The officers searched the small pouch that was located close to the larger, rock-like substance on top of the dresser (R.R. 3-29, 47; State's Exhibits # 15, # 23, # 25). The pouch contained more of the rock-like substance and some cash (R.R. 3-47; State's Exhibit # 24). A trash can was next to the dresser, and that trash can contained several plastic baggies with the corners torn off (R.R. 3-29, 40-41, 46-47; State's Exhibits # 19, # 20, # 21). Based upon their training and experience, the officers knew that such torn plastic baggies were indicative of illegal narcotics packaging (R.R. 3-40-41, 46-47). A smaller amount of the illegal narcotics would be placed in a corner of the plastic baggie, and that corner would then be torn off and twisted for packaging and sale (R.R. 3-40-41, 46-47). Other than their corners having already been torn off, these baggies were empty (R.R. 3-47).

Several pieces of mail and other documents were discovered on top of the dresser, and all of these items contained the appellant's name and the address where the officers were executing the search warrant (R.R. 3-44, 47, 51-53; State's Exhibits # 22, # 41, # 42, # 43, # 44, # 45, # 46 # 47, # 48, # 49). On top of the dresser,

there were also two photographs, both of which depicted the appellant with other unknown persons (R.R. 3-48; State's Exhibits # 26, # 27). These were the only two photographs in the house (R.R. 3-48). Ms. Moreno testified that she kept photographs of her children at the residence, but these may not have been there at the time (R.R. 3-190-92). A search of the closet revealed that it contained primarily clothing for a man (R.R. 3-49; State's Exhibits # 31, # 32). Ms. Moreno testified that she kept some of her clothes in this closet, however (R.R. 3-187-88), and there was a little clothing that apparently belonged to a woman (R.R. 3-50, 84-85; State's Exhibit # 30).

A search of the bathroom revealed that it contained very little feminine products (R.R. 3-50-51, 79, 85-86; State's Exhibits # 33, # 36, # 37, # 39). There were several prescription bottles recovered from the residence, and most of them belonged to the appellant (R.R. 3-43, 93; State's Exhibit # 13). A prescription bottle belonging to Ms. Moreno was also discovered in the bedroom (R.R. 3-42-43, 72; State's Exhibits # 8, # 9). Another cell phone was discovered on the floor, and it was connected to a charger (R.R. 3-43; State's Exhibits # 10, # 11). Ms. Moreno admitted that this phone belonged to her (R.R. 3-116). The officers were able to unlock and search the contents of this cell phone (R.R. 3-60-61).

The officers were aware that crack cocaine is smoked with what is called a crack pipe (R.R. 3-57). No crack pipes were recovered from the residence (R.R. 3-58).

A usable quantity of crack cocaine would be a tenth of a gram, so a typical user would purchase 0.1, 0.2, or 0.3 grams (R.R. 3-58). A tenth of a gram is worth about $10.00, so a typical user would purchase $10.00 to $30.00 worth of crack cocaine (R.R. 3-58). The total amount of the substance recovered from the appellant's residence was 7.8 grams, and it was worth about $250.00 (R.R. 3-58-59). This much cocaine was approximately a quarter of an ounce (R.R. 3-63). This was much more cocaine than a typical user would have (R.R. 3-59). All of the rock-like substances recovered from the appellant's residence were field tested and then packaged together for submission to a narcotics laboratory (R.R. 3-54; State's Exhibit # 55). However, not all of the substances received by the lab were ultimately tested (R.R. 3-124-25, 144; State's Exhibit # 58). A subsequent analysis of that which was tested confirmed that it was 4.75 grams of cocaine (R.R. 3-144-47; State's Exhibit # 58).

The Interview of Ms. Moreno

All of the occupants of the residence were interviewed, and their interviews were videotaped (R.R. 3-95, 110). The officers' interview of Ms. Moreno was introduced into evidence as Defendant's Exhibit # 2 (R.R. 3-95).[1] At the beginning of this interview, Ms. Moreno went to the bedroom with the officers in order to retrieve some medicine for the appellant (R.R. 3-96). Ms. Moreno told the officers

[1] Citations to time are to the approximate time on that exhibit.

that she lived at the residence (1:19). She said that she had been living at the residence for a month or so (R.R. 3-114; 1:21).

When asked about illegal activity occurring at the residence, Ms. Moreno said that the drugs in the residence belonged to her (R.R. 3-73, 81; 1:35). She said that all of the drugs were hers (1:43). When asked how much drugs were in the residence, Ms. Moreno responded that there was a "quarter" (1:51). However, Ms. Moreno did not know what a "quarter" was (R.R. 3-100). When she was asked what she meant by a "quarter," Ms. Moreno had no response (1:54, 2:14). She finally said that a "quarter" referred to a quarter of a gram (2:17), and she said that a quarter of a gram was worth $225.00 (R.R. 3-101; 2:26). Ms. Moreno also said that she was a seller of illegal narcotics (R.R. 3-101; 4:07). When asked how she would sell the crack cocaine, Ms. Moreno said that she would sell $20.00 worth, which was .3 grams (R.R. 3-101; 2:43, 2:47). Ms. Moreno said that she did not know how many grams were in a "quarter" (R.R. 3-127; 2:55). Ms. Moreno said that the cash on top of the dresser belonged to both her and the appellant (3:36).

Ms. Moreno did not appear to be fully versed in the illegal narcotics trade. "The story on how she distributed the drugs was pretty farfetched." (R.R. 3-107). One of the officers testified,

> That you just go to somebody's house to buy the drugs, with no phone calls or any lead-up. That she would just occasionally see people and she would know them because she's a drug user and she would – in my experience and my training with drug dealers, that's not – that's not how

to be a very successful drug dealer.

(R.R. 3-107). The officer further testified,

> Just the basic understanding – or basic terminology that the typical street-level dealer would understand, she just had no understanding of. The quarter's one; but, you know, being able to articulate how much a quarter is. Because, I mean, if you can't articulate that, when you go to buy a quarter, how do you know you're getting a quarter for more or less? Just her – just based on my training and experience with street-level drug dealers, her explanation of the method of operation, I guess, was contrary to what I know.

(R.R. 3-120). The amount of cash inside the residence was also not consistent with a street-level drug dealer, which was what Ms. Moreno was claiming to be (R.R. 3- 108).

After the officers explained to Ms. Moreno that the appellant was still going to be arrested, she ultimately said that the crack cocaine was not hers (R.R. 3-104-05; 7:10). Ms. Moreno said that she did not want the appellant to go to prison (6:35). That is why Ms. Moreno said that the illegal narcotics were hers (7:12). Ms. Moreno said that the only reason that she knew that .3 grams was worth $20.00 was because that was how she had bought crack cocaine in the past (7:35). Ms. Moreno said that it had been "years ago" when she had last purchased crack cocaine (7:43). Ms. Moreno said that she had never sold drugs at the residence and had never had drugs delivered to the residence (7:55). Ms. Moreno admitted that her original claim to the illegal narcotics was a lie (7:59).

Ms. Moreno said that her phone was on the left side of the bed and that the appellant's phone was on the dresser (R.R. 3-116; 8:19). She also stated that she and

the appellant were in a relationship and that she was the appellant's girlfriend (8:25). When the officers asked Ms. Moreno if she had ever seen the appellant sell illegal narcotics at the residence, Ms. Moreno said that she had (R.R. 3-117; 8:35). The appellant was looking through the window from outside the residence when the officers asked Ms. Moreno this question (R.R. 3-117-18; 8:38).

Ms. Moreno's Affidavits

After the State rested (R.R. 3-147), the appellant's trial attorney called Ms. Moreno as a witness, and during her testimony, two affidavits were introduced into evidence. On September 24, 2015, Ms. Moreno swore to an affidavit in which she stated,

> I Tina Moreno is making this statement to let you that Charles Lynch had no knowledge of the controlled substance that was found in Mr. Lynch's house. All the controlled substance that was found in Mr. Lynch's house belonged to me tina Moreno.

(R.R. 3-156-57; Defendant's Exhibit # 4). Ms. Moreno testified that she completed this affidavit because the officers had intimidated her into saying that the illegal narcotics belonged to the appellant (R.R. 3-158, 163).

On June 19, 2017, Ms. Moreno swore to another affidavit in which she stated,

> I was present when all of the officers entered our home at 1116 2nd st, rear, in LA Marque Texas. I had been living at that residence with Charles Lynch for several months. Regretfully to admit I am a user of narcotics and have been using crack cocaine for a number of years now. On this particular day of Sept 23rd 2015, I purchased some cocaine and

brought it to the house unbeknownst to Charles Lynch. Charles Lynch is aware that I have had issues previously with the use of crack cocaine but I lead him to believe that I had left that in the past and was past that point in my life, however I was not and I did not inform him of this purchase or where the narcotic were. Mr. Lynch and myself share a bedroom and while he was in the living room I had come to the room to change my clothes and while doing so I placed the my belonging from my pockets onto the dresser and this included the crack cocaine. I honestly meant to pick it back up and put it back in my pockets but it must of slipped my mind. Charles and I both share this dresser so it is not unusual for him to have items left on that dresser as well especially since he tend to keep him medicines by the bed because he generally takes them at night and in the mornings when he wakes up. Charles would have had no way of knowing I left that crack cocaine in the room because I did not tell him I purchased it, as well he never went back into the bedroom. I changed my clothes in the room while Charles was in the living room with the other people in the house and he did not come back to the bedroom at any point after that because I would have seen him. The only place outside of the living room and kitchen area he went to was the main bathroom but he never went back in the bedroom. That point and all of the belongings inside of that pouch belonged to me and Charles Lynch was totally unaware that I had them. I was in full care custody and control of all of these items. I did try and tell the officers this on the scene and take full responsibility but for some reason they did not believe me and actually intimidated me and scared me into changing my story into blaming Charles Lynch, like they clearly wanted me to do for some reason. The officer tried to trick me with drug dealer terminology and threats of jail for the both of us and truly I am a user and not a seller so I am unaware of a lot of the terminology used in the drug trade I just know what to ask for and they give me a certain amount. I knew and currently know that it wasn't right for me to let Charles Lynch take the blame for something he had no knowledge of so I went again to take full responsibility by filling out an affidavit on September 24, 2015 and I am again filing this more detailed affidavit out in June 2017 because it is the right thing to do as Charles Lynch had no knowledge of any crack cocaine in that house and it would be wrong for me to let him take the fall for something when I know I was fully responsible.

(R.R. 3-160-62; Defendant's Exhibit # 3). Ms. Moreno admitted that she filled out

this affidavit in the presence of the appellant's trial attorney (R.R. 3-206).

Ms. Moreno's Testimony

During her testimony, Ms. Moreno again stated that she lived at the appellant's residence and that she had started living at the appellant's residence in July or August of that year (R.R. 3-157, 183-84). Ms. Moreno testified that she also continued living at her mother's residence during this time (R.R. 3-184-85). Ms. Moreno testified that mail would arrive for her at both addresses and that she would keep the mail in her purse, which the officers never searched (R.R. 3-185-86). Ms. Moreno testified that she would keep her clothes at both houses (R.R. 3-187). Ms. Moreno ultimately testified that she spent 30 percent of the time at the appellant's residence (R.R. 3-189). She testified that she and the appellant shared the bedroom (R.R. 3-204).

Ms. Moreno testified that the crack cocaine recovered from the appellant's residence belonged to her (R.R. 3-153, 224). She testified that she purchased this crack cocaine in La Marque on the day before the search warrant was executed (R.R. 3-167-70). Ms. Moreno testified that she walked to the house where she purchased the crack cocaine, but she could not remember when it was that she did so (R.R. 3-169-70). Ms. Moreno said that she just showed up at the drug dealer's house in order to make the purchase of crack cocaine (R.R. 3-170). Ms. Moreno could not remember from whom she purchased the crack cocaine (R.R. 3-167-69). Ms. Moreno

testified that she purchased a "quarter ounce," and that she paid $225.00 for it (R.R. 3-169, 174-75).

Ms. Moreno testified that, when she purchased the crack cocaine on the day before the search warrant was executed, she was going to smoke it that day (R.R. 3-177). She stated that she was going to smoke the crack cocaine at the appellant's residence with a crack pipe, and that she was going to smoke it when the appellant was not there (R.R. 3-177). She said that she usually kept a crack pipe on her person, but she did not have one when she brought the cocaine to the appellant's residence (R.R. 3-177-78). Ms. Moreno testified that she did not know how she was going to ingest the cocaine that she purchased on the day before the search warrant was executed (R.R. 3-176).

When it was noted that several rocks of crack cocaine were recovered from the dresser, Ms. Moreno was not clear on how she came into possession of the various rocks (R.R. 3-207-10). Ms. Moreno testified that she would purchase crack cocaine from several different people, but she could not remember how many different people (R.R. 3-168). When asked whether Ms. Moreno usually purchased a quarter ounce of crack cocaine, she did not respond—twice (R.R. 3-171). But then she said that she usually purchased a "quarter" (R.R. 3-171). She would usually pay $225.00 for the "quarter" of crack cocaine (R.R. 3-172-73).

However, Ms. Moreno did not know how much four grams of cocaine cost

(R.R. 3-174). Ms. Moreno testified that she would also only purchase $20.00 worth of crack cocaine on occasion (R.R. 3-175). Ms. Moreno testified that she would sell some of the crack cocaine that she had purchased (R.R. 3-193-94). She said that she would sell 0.3 grams for $20.00 (R.R. 3-194). Ms. Moreno testified that she would measure the crack cocaine on a scale, or she would just use her eyes (R.R. 3-195). Ms. Moreno testified that she kept the scale in her pocket, but that it was sitting out on the dresser in plain view on the day that the search warrant was executed (R.R. 3-196). When informed that no scale was observed by the police, Ms. Moreno suggested that the police had moved it (R.R. 3-197).

Ms. Moreno testified that the little pouch of money and crack cocaine that was found on top of the dresser belonged to her (R.R. 3-202). Ms. Moreno testified that she used the knife that was found on top of the dresser, but that the knife did not belong to anyone (R.R. 3-203). She testified that the knife did not belong to the appellant (R.R. 3-204). The knife had been there before the appellant and Ms. Moreno started dating (R.R. 3-204). Ms. Moreno testified that, while she had no previous drug convictions, she did have previous theft convictions because she had stolen in order to support her drug habit (R.R. 3-163-64, 173-74).[2]

Ms. Moreno testified that the appellant had no knowledge of the illegal narcotics (R.R. 3-153, 225). She said that the appellant did not know about the

[2] Ms. Moreno admitted on cross-examination that she did have a previous conviction for possession of marijuana, but she claimed that it had been dismissed (R.R. 3-166).

cocaine on the dresser and that he did not go into his bedroom (R.R. 3-225). Ms. Moreno testified that the appellant did not know that Ms. Moreno was using and possibly selling drugs (R.R. 3-153). Ms. Moreno testified that the appellant did not approve of Ms. Moreno using and selling drugs at his residence and that she had to hide it from him (R.R. 3-153-54, 179). Ms. Moreno testified that she would hide the crack cocaine on her person (R.R. 3-179).

Ms. Moreno testified that she would often throw her crack pipes away, so that the appellant would not find them, and then she would have to purchase another crack pipe (R.R. 3-178). Ms. Moreno testified that the smell of crack cocaine would not linger in the appellant's residence because she would blow it out the door (R.R. 3-179). When asked why she put the crack cocaine in plain view on top of the appellant's cell phone, Ms. Moreno responded that the appellant was not home at the time and she forgot to put everything back in her pockets after she changed clothes (R.R. 3-180). Ms. Moreno testified that she was in a hurry to hide the crack cocaine, but that she did not get to it in time (R.R. 3-180). The appellant had only been at his residence for a few minutes when the police arrived in order to execute the search warrant (R.R. 3-181-83). Ms. Moreno also testified that she did not have time to throw the trash out (R.R. 3-212).

The State's Rebuttal – The Two Prior Convictions

After the defense rested (R.R. 3-226), the trial prosecutor argued that the "door had been opened" to the admissibility of the appellant's prior narcotics convictions (R.R. 3-227-28; R.R. 4-5). The trial prosecutor stated that he was offering the following prior narcotics convictions into evidence:

- 1990 conviction for possession of methamphetamine, for which the appellant was sentenced to two years in prison;
- 2006 conviction for possession of cocaine with the intent to deliver, for which the appellant was sentenced to ten years in prison;
- 2006 conviction for possession of a controlled substance, for which the appellant was sentenced to ten years in prison; and
- 2006 conviction for possession of a controlled substance with the intent to deliver, for which the appellant was sentenced to ten years in prison

(R.R. 4-14-15).

The trial prosecutor asserted that these four prior narcotics convictions were admissible because the defense had raised—through the testimony of Ms. Moreno—the following claims:

- the appellant did not have the intent to possess or deliver the crack cocaine; and
- the appellant did not know about the possession of cocaine in his own home

(R.R. 3-227-28; R.R. 4-5).

The trial prosecutor stated that the State had no way to rebut Ms. Moreno's testimony in that regard, except to present evidence of his four prior narcotics convictions, which would show that it was much less likely that the appellant did not have the requisite intent and knowledge (R.R. 3-228). The trial prosecutor stated,

> [Ms. Moreno] negated every single piece of evidence that we had of the Defendant's intent not just to possess the drugs, but also to distribute them. She took the blame for the knife with cocaine on it, for all the packaging, for the individual wrapped rocks, in addition to a large rock. Her testimony completely negated all of our evidence of intent.

(R.R. 4-5-6).

The trial prosecutor stated that the appellant's four prior narcotics convictions were admissible under Rule 404(b) of the Texas Rules of Evidence:

- to rebut a defensive theory;
- as evidence of the appellant's intent;
- as evidence of the absence of the appellant's mistake or accident; and
- under the "doctrine of chances"

(R.R. 4-6). With regard to the "doctrine of chances," the trial prosecutor stated, "What are the chances that someone who has no criminal history whatsoever for drugs is doing this underneath the Defendant's nose with him ever noticing, when he's been guilty of doing that exact same thing on four prior occasions? What are the chances that he wouldn't notice her doing these things?" (R.R. 4-6).

After the appellant's trial attorney raised his objections to the admissibility of the four prior convictions, the trial prosecutor noted that the appellant had been sentenced to ten years in prison on the most recent narcotics convictions and that he was released from prison in 2014, shortly before the charged offense was committed (R.R. 4-16). The trial prosecutor stated that he was offering the four prior convictions through self-authenticating exhibits (R.R. 3-229-30); therefore, it would take little time for these convictions to be introduced and admitted (R.R. 4-17). The trial prosecutor stated, "The evidence that we are offering is proof of the conviction, and we're actually trying to limit the evidence beyond that because we don't want to get into those details because that would be inflammatory when you start talking all about these other offenses." (R.R. 4-22).

The trial judge noted that Ms. Moreno testified that the appellant would never allow possession of cocaine to occur in his home, that he did not like cocaine, and that she was forced to hide her possession of cocaine (R.R. 4-21). The trial judge asserted that the defense had painted a picture of the appellant that he was an "upstanding citizen who would never ever allow drugs in his home." (R.R. 4-21). The trial judge stated that she would allow into evidence the appellant's two prior convictions for possession of cocaine with the intent to deliver (R.R. 4-25). She ordered the State to redact from one of the indictments the reference to an enhancement paragraph and redact from the penitentiary packet references to

disciplinary reports (R.R. 4-25).

After the appellant's trial attorney requested that the trial judge admit the evidence with a limiting instruction, the trial prosecutor stated that "the standard instruction would be that this evidence is being offered for the limited purpose to show intent, motive, or absence of mistake, [opportunity, knowledge] if any; and can only be considered for such purpose, and only if you believe it beyond a reasonable doubt." (R.R. 4-26-27). The appellant's trial attorney stated that the trial prosecutor's suggestion would be appropriate (R.R. 4-27). The trial prosecutor later offered State's Exhibit # 60 into evidence, and the trial judge admitted the exhibit into evidence (R.R. 4-29-30). The exhibit contained the following documents:

- A judgment reflecting that, on July 19, 2006, in cause number 05-CR-0573, in the 56th District Court of Galveston County, the appellant was convicted of the offense of possession of cocaine, weighing 4 to 200 grams, with the intent to deliver, with the date of the offense occurring on December 9, 2004, and for which the appellant was sentenced to ten years in prison;
- The indictment for that offense;
- A judgment reflecting that, on July 19, 2006, in cause number 06-CR-0387, in the 56th District Court of Galveston County, the appellant was convicted of the offense of possession of cocaine, weighing 4 to 200 grams, with the intent to deliver, with the date of the offense occurring on February 9, 2006, and for

which the appellant was sentenced to ten years in prison;

- The indictment for that offense

(R.R. 4-30-31; State's Exhibit # 60).

The Trial Court's Instructions to the Jury

After this evidence was admitted, the trial judge gave the following limiting instruction to the jurors:

> [T]hat evidence was offered by the State as rebuttal evidence to the Defendant's defensive theory of this case. This evidence may only be considered to show, if it does, the Defendant's intent, motive, opportunity, preparation, plan, absence of mistake or accident, or knowledge, if any.
>
> You may not consider this evidence unless you find and believe beyond a reasonable doubt that the Defendant committed these other acts, if any were committed. This evidence may not be considered as character evidence of the Defendant; and it may not be used as evidence that on this particular occasion, the Defendant acted in accordance with that alleged character trait, if any.

(R.R. 4-31-32).

The trial judge provided the following additional instruction to the jurors in the court's final charge to the jury:

> The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, for the purpose of showing the defendant's motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident, if any. You cannot consider the testimony unless you find and believe beyond a reasonable doubt that the Defendant committed these acts, if any, were

committed.

(C.R. 63-64; R.R. 4-37).

The Attorneys' Final Arguments to the Jury

In his final argument to the jury, the appellant's trial attorney stated the following with regard to the appellant's two prior convictions:

> The evidence offered by the State is rebuttal evidence. The Judge made it very clear, this evidence may not be used to show character or conformity therewith. Look at it. There's nothing in it that shows intent, motive, or anything else. It only shows that it happened.
>
> The Judge was clear in that instruction. You can only use it for the limited use, and that it cannot be used to show character or conformity therewith. I'm sure you're smart enough to see that this alone can show nothing, other than the fact that "You did this once, I know you had to have done it again."
>
> It doesn't show any intent. It doesn't show – it doesn't even show whether it's 4 to 200. It doesn't show the same common beings. It doesn't show that it happened the same way. It just shows that something happened; even though in those cases, it would be totally different because he's pled to those. We're in trial here. This is the first time he's done that. There's something different about this. It's not the same.

(R.R. 4-55-56).

In her final argument to the jury, the trial prosecutor argued as follows:

> The issue is knowledge and intent.
>
> And the Defense's witness that got on the stand to try to rebut all of our evidence about knowledge and intent was Ms. Moreno.

(R.R. 4-59-60). After noting the various different stories that Ms. Moreno had provided, the trial prosecutor argued,

> I'm sure you're asking yourself, "Well, if the Judge gave me those instructions on how I can't use it, why – the previous convictions on Mr. Lynch – why did the State bring me that?"
>
> Well, the reason why I entered that was because Ms. Moreno gets on the stand and pretty much says, "Hey, I ran this whole operation under his nose. He had no knowledge, no intent. He wouldn't go for that. Pretty much, he's a saint. He doesn't want any of that in his house.
>
> So to rebut that, I brought you: Well, he's not above having cocaine in his possession; and, in fact, cocaine, with possession and the intent to deliver. The same exact reason why we're here today.
>
> But Defense counsel wants you to believe that, "No, he's just a saint. He would never have that going on."

(R.R. 4-61-62).

SUMMARY OF THE ARGUMENT

The State was permitted to introduce evidence of the appellant's prior convictions through extrinsic evidence, and not just through cross-examination of Ms. Moreno, because her evidence was directly relevant to the offense charged.

The State was permitted to introduce the appellant's prior convictions for possession of cocaine with the intent to deliver (1) in order to show that the appellant had knowledge of the cocaine and (2) in order to rebut the defensive theory that the appellant was not involved in, and was in fact opposed to, the possession of cocaine

with the intent deliver that was occurring in his own home.

In presenting extrinsic evidence of the appellant's prior convictions, the State was not required to introduce the details of the prior convictions in order to show their similarity to the charged offense.

The trial judge did not abuse her discretion in concluding that the probative value of the appellant's prior convictions was not substantially outweighed by the danger of unfair prejudice.

This Court should disregard any error on the part of the trial judge in introducing the appellant's two prior convictions into evidence because that evidence did not affect the appellant's substantial rights.

GROUNDS FOR REVIEW

1. The court of appeals erred in holding the trial judge abused her discretion in admitting into evidence two of the appellant's prior cocaine convictions in order to prove the appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, even after a defense witness claimed the appellant had no knowledge or intent to commit the charged offense (R.R. 3-226-30; R.R. 4-5-32, 37, 61-62; C.R. 63-64).

2. The court of appeals erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or

intent in his current narcotics prosecution, the State must also show the facts or details of the prior narcotics cases in order to show their similarity to the charged offense (R.R. 3-226-30; R.R. 4-5-32, 37, 61-62; C.R. 63-64).

3. The court of appeals erred in holding the appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more (R.R. 3-226-30; R.R. 4-5-32, 37, 61-62; C.R. 63-64).

FIRST AND SECOND GROUNDS FOR REVIEW

The court of appeals erred in holding that the trial judge abused her discretion in admitting into evidence two of the appellant's prior cocaine convictions in order to prove the appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, even after a defense witness claimed that the appellant had no knowledge or intent to commit the charged offense.

The court of appeals erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or intent in his current narcotics prosecution, the State must also show the facts or details of the prior narcotics cases in order to show their similarity to the charged offense.

ARGUMENT AND AUTHORITIES

Standard of Review and Controlling Law

An appellate court reviews the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. An appellate court may not substitute its own decision for that of the trial court. *Gonzalez v. State,* 544 S.W.3d 363, 370 (Tex. Crim. App. 2018).

As long as the trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion, and the trial court's ruling should be upheld. A trial court's ruling is generally within this zone if the evidence shows that 1) an extraneous transaction is relevant to a material, non-propensity issue, and 2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Furthermore, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial judge gave the wrong reason for his right ruling. *De la Paz v. State,* 279 S.W.3d 336, 343-44 (Tex. Crim. App. 2009).

A person commits the offense charged in this case if he knowingly possesses with intent to deliver a controlled substance listed in Penalty Group 1. TEX. HEALTH & SAFETY CODE § 481.112(a). Cocaine is a Penalty Group 1 substance. TEX. HEALTH & SAFETY CODE § 481.102(3)(D). To sustain a conviction for unlawful possession of a controlled substance, the State must prove that the accused exercised care, control, and management over the contraband and that the accused knew the matter was contraband. *Ex parte Lane,* 303 S.W.3d 702, 709 (Tex. Crim. App. 2009).

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action. TEX. R. EVID. 401. Relevant evidence is generally admissible; irrelevant evidence is not. TEX. R. EVID. 402. Evidence does not need to prove or disprove a

particular fact by itself to be relevant. It is sufficient if the evidence provides a small nudge toward proving or disproving a fact of consequence. *Gonzalez,* 544 S.W.3d 363 at 370.

Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. TEX. R. EVID. 404(b)(1). However, evidence of a crime, wrong, or other act may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. TEX. R. EVID. 404(b)(2). Rule 404(b) is a rule of inclusion rather than exclusion—it excludes only evidence that is offered solely for proving bad character and conduct in conformity with that bad character. *Dabney v. State,* 492 S.W.3d 309, 317 (Tex. Crim. App. 2016).

The exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive. The rule excludes only that evidence that is offered (or will be used) solely for the purpose of proving bad character and hence conduct in conformity with that bad character. The proponent of uncharged misconduct evidence need not "stuff" a given set of facts into one of the laundry-list exceptions set out in Rule 404(b), but he must be able to explain to the trial court, and to the opponent, the logical and legal rationales that support its admission on a basis other than "bad character" or propensity purpose. *De la Paz,* 279 S.W.3d at 343.

Extraneous-offense evidence may be admissible when it is relevant to a non-character conformity issue of consequence in the case, such as establishing intent or rebutting a defensive theory. *Robbins v. State,* 88 S.W.3d 256, 259 (Tex. Crim. App. 2002).

In *Powell v State,* the court of appeals had found that, during final jury arguments the prosecution urged the jury to use the extraneous offense evidence for its improper character conformity purpose. The court of appeals had concluded from this that the prosecution's purpose of the extensive extraneous offense testimony was to show the defendant's bad character as a child molester generally. This Court noted that the relevant inquiry, however, is whether the evidence was admissible for its non-character conformity purpose. While evidence of other crimes, wrongs or acts may have a tendency to show character conformity, it may also be admissible for another purpose, such as rebuttal of a defensive theory—it has relevance apart from proof of character conformity. *Powell v. State,* 63 S.W.3d 435, 439 (Tex. Crim. App. 2001).

Application

In this case, the defense presented evidence—through Ms. Moreno—that the appellant was not involved in the possession of cocaine with the intent to deliver that was occurring at his residence and that the appellant did not know about the cocaine that was present in plain view in his own residence. By the time that Ms. Moreno testified, the jury had already heard evidence from her on-the-scene interview that

- The cocaine in the residence belonged to her alone (R.R. 3-73, 81; 1:35, 1:43); and
- Ms. Moreno was a seller of illegal narcotics (R.R. 3-101; 4:07)[3]

In Ms. Moreno's testimony, the jury heard the following additional evidence regarding the possession of cocaine in the appellant's residence and the appellant's knowledge of that cocaine

- The first affidavit (R.R. 3-156-57; Defendant's Exhibit # 4)
    - The appellant had no knowledge of the cocaine that was recovered from his residence
    - All of the cocaine in the appellant's residence belonged to Ms. Moreno
    - The officers intimidated Ms. Moreno into saying that the cocaine belonged to the appellant (R.R. 3-158, 163)
- The second affidavit (R.R. 3-160-62; Defendant's Exhibit # 3)
    - Ms. Moreno purchased the cocaine that was recovered from the appellant's residence
    - The appellant did not know about the cocaine in his residence
    - Ms. Moreno led the appellant to believe that she was no longer involved with cocaine
    - Ms. Moreno placed the pieces of cocaine on the dresser while the

[3] This interview was introduced by the defense during cross-examination of one of the officers (R.R. 3-95; Defendant's Exhibit # 2).

appellant was in the living room

- The appellant was totally unaware of the cocaine that was on top of his dresser
- The officers intimidated and scared Ms. Moreno into blaming the appellant for her cocaine
- It was wrong for Ms. Moreno to blame the appellant for something that he had no knowledge of
- The appellant had no knowledge of the cocaine in his residence

- Ms. Moreno's testimony
  - The cocaine recovered from the appellant's residence belonged to Ms. Moreno (R.R. 3-153, 224)
  - The appellant had no knowledge of the cocaine (R.R. 3-153, 225)
  - The appellant did not know about the cocaine on the dresser, and he did not go into his bedroom (R.R. 3-225)
  - The appellant did not know that Ms. Moreno was using and selling cocaine (R.R. 3-153)
  - The appellant did not approve of Ms. Moreno using and selling cocaine, and she was forced to hide it from the appellant (R.R. 3-153-54)

Thus, the defense presented extensive evidence—through Ms. Moreno—that the appellant was not involved in the possession of cocaine with the intent to deliver that

was occurring at his residence and that the appellant had no knowledge of the cocaine that was present in plain view in his residence. The appellant's two prior convictions for possession of a controlled substance with the intent to deliver were admissible to rebut the defense claim that the appellant would not be involved in the possession of cocaine with the intent to deliver, that the appellant did not approve of cocaine, and that the appellant had no awareness or knowledge of cocaine.

The State was permitted to introduce evidence of the appellant's prior convictions through extrinsic evidence, and not just through cross-examination of Ms. Moreno, because her evidence was directly relevant to the offense charged.

In its opinion, the court of appeals suggested that the State offered the appellant's two prior cocaine convictions **merely** to impeach or correct a false impression created by Ms. Moreno's evidence. *Lynch,* 612 S.W.3d at 610-11. The court of appeals then suggested that the only manner in which the State could introduce the appellant's two prior cocaine convictions was during its cross-examination of Ms. Moreno. *Lynch,* 612 S.W.3d at 610 ("the opponent must correct the 'false impression' through cross-examination of the witness who left the false impression, *not* by calling other witnesses to correct the false impression.") (citing *Wheeler v. State,* 67 S.W.3d 879, 885 (Tex. Crim. App. 2002). First of all, the State did not offer the appellant's two prior convictions **merely** to impeach Ms. Moreno's evidence. Secondly, controlling case law from this Court would not restrict the State

to rebutting Ms. Moreno's testimony by only cross-examining Ms. Moreno.

In *Wheeler,* this Court held that it was permissible for the State to cross-examine a defense expert about an extraneous offense allegedly committed by the defendant in order to test the basis for the defense expert's opinion. *Wheeler,* 67 S.W.3d at 883-84. Thus, this portion of *Wheeler* dealt with the State's introduction of an extraneous offense (1) in order to challenge the basis of a defense expert's opinion and (2) in order to challenge the expert's opinion regarding the defendant's character. In *Wheeler,* the State did not offer the extraneous offense in order to help prove an element of the charged offense.

In *Wheeler,* this Court held that the State's cross-examination of the defense expert would not have, by itself, opened the door to extrinsic evidence of the extraneous misconduct. *Wheeler,* 67 S.W.3d at 885. This holding is nothing more than the well-settled proposition that the proponent of otherwise inadmissible evidence cannot "open its own door" to the admissibility of that evidence. *See, e.g., Crenshaw v. State,* 125 S.W.3d 651, 656 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (citing *Shipman v. State,* 604 S.W.2d 182, 184-85 (Tex. Crim. App. 1980)).

In *Wheeler,* this Court additionally held that the State's cross-examination of the defense expert was also permissible to correct the false impression that the expert's testimony clearly left with the jury concerning the defendant's risk of abuse. When a witness presents a picture that the defendant is not the type of person to commit the

charged offense, the prosecution may impeach that witness's testimony by cross-examining the witness concerning similar extraneous offenses. This Court held that the evidentiary caveat, however, was that the opponent must correct the "false impression" through cross-examination of the witness who left the false impression, *not* by calling other witnesses to correct that false impression. *Wheeler,* 67 S.W.3d at 885. The State has no quarrel with that holding, but the State does not believe that this portion of *Wheeler* was intended to be a general explanation of the limits for correcting a witness's false impression.

In *Hayden v. State,* this Court reiterated this aspect of *Wheeler* when it noted that courts generally prohibit a party from using extrinsic evidence to impeach a witness on a **collateral issue**. An issue is collateral if, beyond its impeachment value, a party would not be entitled to prove it as a part of his case. However, in *Hayden,* this Court noted that the rule would be different if a witness's testimony created a false impression that was "directly relevant to the offense charged." *Hayden v. State,* 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). In this case, Ms. Moreno's testimony was directly relevant to the offense charged. She testified and presented evidence that the appellant did not possess the cocaine with the intent to deliver it and that the appellant did not know about or even approve of the cocaine in his residence.

In *Daggett v. State,* this Court confirmed this same concept: When a witness makes a broad statement of good conduct or character on a **collateral issue**, the

opposing party may cross-examine the witness with specific instances rebutting that false impression, but generally may not offer extrinsic evidence to prove the impeachment acts. However, where—as in *Daggett*—the defendant's statement of good conduct was directly relevant to the offense charged—i.e., "I would never have sexual relations with a minor"—the State could both cross-examine the defendant and offer extrinsic evidence rebutting the statement. That would not be impeachment on a collateral matter. The statement of good conduct went to the "heart" of the matter. *Daggett v. State,* 187 S.W.3d 444, 453 n.24 (Tex. Crim. App. 2005).

Courts generally prohibit a party from using extrinsic evidence to impeach a witness **on a collateral issue**. However, if the witness's testimony created a false impression directly relevant to the offense charged—such as the defendant's knowledge or intent as to the charged offense—the opposing party would be permitted to delve into the issue beyond the limits of cross examination. *Hayden,* 296 S.W.3d at 554. If the State offered the appellant's two prior cocaine convictions merely because the defense "opened the door" through Ms. Moreno's testimony, the State would not be restricted to cross-examining Ms. Moreno about the appellant's prior convictions. The State could offer those prior convictions in rebuttal. *Daggett,* 187 S.W.3d at 453-54 & n.24.

In *Houston v. State,* the defense cross-examined a police officer and elicited evidence that the defendant dressed shabbily, drove an old car, and did not make a lot

of money in the drug business. Other questioning clearly implied that the defendant was only a marginal participant in the drug trade and that the primary transaction constituted his sole involvement in the drug business. In response, the State presented evidence that a partnership existed between the defendant and another person and that the two conspired to sell the officer two ounces of crack cocaine several weeks after the initial transaction. Consistent with this Court's holdings in *Hayden* and *Daggett,* the court of appeals held that this evidence was appropriately admitted to correct the false impression left by the defendant. *Houston v. State,* 208 S.W.3d 585, 591 (Tex. App.—Austin 2006, no pet.).

Likewise, Ms. Moreno testified and presented evidence that was directly relevant to the offense charged—whether the appellant knowingly possessed cocaine with the intent to deliver it. She testified and presented evidence that

- The appellant had no knowledge or awareness of the cocaine in plain view on top of the dresser in his residence
- The appellant did not know that Ms. Moreno was using and selling cocaine
- The appellant did not approve of Ms. Moreno using and selling cocaine, and she was forced to hide it from the appellant.

The State could have cross-examined Ms. Moreno about extraneous offenses to rebut her evidence, but the State was also permitted to introduce extraneous offenses as extrinsic evidence to rebut the defensive evidence.

The State was permitted to introduce the appellant's prior convictions for possession of cocaine with the intent to deliver (1) in order to show that the appellant had knowledge of the cocaine and (2) in order to rebut the defensive theory that the appellant was not involved in, and was in fact opposed to, the possession of cocaine with the intent deliver that was occurring in his own home.

Both at trial and on appeal, the State has identified several decisions from the various courts of appeals regarding the admissibility of extraneous offenses in narcotics prosecutions in order to rebut the defendant's claim that he did not have the requisite knowledge and/or intent:

- *Knight v. State,* 457 S.W.3d 192, 203 (Tex. App.—El Paso 2015, pet. ref'd) (prosecution witnesses' testimony had relevance apart from any tendency to prove character conformity because that testimony logically made the elemental facts of intent and knowledge more probable and the defendant's defense of mistake less probable);
- *Shedden v. State,* 268 S.W.3d 717, 738-39 (Tex. App.—Corpus Christi 2008, pet. ref'd) (witnesses were properly permitted to testify they purchased drugs from defendant in rebuttal to defensive theory that drugs belonged to co-defendant and defendant was unaware of drugs in the home);
- *Wingfield v. State,* 197 S.W.3d 922, 925-26 (Tex. App.—Dallas 2006, no pet.) (in marijuana-possession prosecution, evidence defendant used marijuana in past was circumstantial evidence defendant knowingly or intentionally possessed

marijuana on date in question, and it was admissible to rebut defensive theory defendant had no knowledge or intent);

- *Swarb v. State,* 125 S.W.3d 672, 683-84 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (evidence of defendant's two prior narcotics convictions was admissible under Rule 403 because evidence made defendant's intent and knowledge of methamphetamine in his truck more probable, and it rebutted defendant's evidence of lack of intent and knowledge);
- *Mason v. State,* 99 S.W.3d 652, 655-56 (Tex. App.—Eastland 2003, pet. ref'd) (citing *Powell v. State,* 5 S.W.3d 369, 383 (Tex. App.—Texarkana 1999, pet. ref'd) (conduct occurring after charged offense was used to show defendant knew substance was illegal));
- *Dade v. State,* 956 S.W.2d 75, 79-80 (Tex. App.—Tyler 1997, pet. ref'd) (defendant's prior arrest for marijuana possession was admissible to show defendant was aware of marijuana in charged offense);
- *Caballero v. State,* 881 S.W.2d 745, 748 (Tex. App—Houston [14th Dist.] 1994, no pet.) (defendant's prior cocaine-possession conviction was some evidence from which jury could infer defendant knew there was cocaine residue in crack pipe);
- *Chavez v. State,* 866 S.W.2d 62, 65 (Tex. App.—Amarillo 1993, pet. ref'd) (defendant's prior drug deals had tendency to make it more probable that he

aided, assisted or promoted transaction in question);

- *Kemp v. State,* 861 S.W.2d 44, 46 (Tex. App.—Houston [14th Dist.] 1993, no pet.) (defendant's prior narcotics convictions were admissible as substantive evidence that defendant knowingly possessed cocaine);
- *Payton v. State,* 830 S.W.2d 722, 730 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (defendant's previous sale of cocaine was admissible to prove that defendant's charged possession of controlled substance was made with intent to deliver);
- *Patterson v. State,* 723 S.W.2d 308, 313 (Tex. App.—Austin 1987), *aff'd and remanded on other grounds,* 769 S.W.2d 938 (Tex. Crim. App. 1989) (knowledge is essential element of crime of narcotics possession; evidence of defendant's previous drug use and possession was relevant);
- *Howard v. State,* 713 S.W.2d 414, 416 (Tex. App.—Fort Worth 1986), *pet. ref'd per curiam,* 789 S.W.2d 280 (Tex. Crim. App. 1988) (defendant's prior drug sales were admissible, and extraneous offenses were admissible to prove intent and knowledge, which were contested by defendant).

In this case, the court of appeals spent little or no time addressing any of these decisions. There are distinguishing characteristics to each of these cases, but they all stand for the same proposition—when a narcotics defendant has presented evidence that he lacked knowledge or awareness of the charged illegal substance, the State is

permitted to present some evidence of the defendant's other illegal narcotics activity in order to show that the defendant does in fact have knowledge and awareness of the illegal substance.

In *Dabney v. State,* a prosecution for manufacturing methamphetamine, this Court held that the defendant's defense that he did not know that there was a methamphetamine lab on his property opened the door to the admission of evidence that officers had previously found a methamphetamine lab on his property. This Court relied upon the "doctrine of chances" in noting that the defendant's defense that he found himself in an unfortunate, highly unlikely situation became less credible when presented with evidence that he had been found in that exact same situation before. *Dabney v. State,* 492 S.W.3d 309, 317 (Tex. Crim. App. 2016).

Likewise, in this case, the appellant presented evidence (1) that the appellant had no knowledge or awareness of the cocaine in plain view on top of the dresser in his residence, (2) that Ms. Moreno was involved in the use and sale of cocaine in his own residence, and (3) that the appellant did not approve of Ms. Moreno using and selling cocaine at his residence, so much so that she was forced to hide it from him. The jury certainly could have found the appellant not guilty based upon this evidence. But this evidence became less credible in light of the fact that the appellant had been twice previously convicted of possession of cocaine with the intent to deliver. Such a defendant would be aware of cocaine in plain view in his own home. Such a

defendant would be aware of the use and sale of cocaine at his own home. Such a defendant would be more likely to approve of the use and sale of cocaine, so that no one would have to hide it from him. As noted by the trial prosecutor, **"**What are the chances that someone who has no criminal history whatsoever for drugs is doing this underneath the Defendant's nose with him ever noticing, when he's been guilty of doing that exact same thing on four prior occasions? What are the chances that he wouldn't notice her doing these things?" (R.R. 4-6).

Both at trial and on appeal, the State relied upon the decision of the Fourteenth Court of Appeals in *Le v. State.* That case was a prosecution for possession of marijuana, in which the defendant did not dispute the presence of marijuana in his truck at the time in question, but vigorously challenged whether he knowingly or intentionally possessed the contraband. Defense counsel raised the issue in his opening statement, in cross-examining police officers, and in examining a witness, who asserted that all of the marijuana belonged to him and the defendant was unaware of its presence. The State introduced extraneous offense evidence for the very purpose of rebutting the defendant's position that he lacked the requisite intent or knowledge required for conviction for possession of marijuana. *Le v. State,* 479 S.W.3d 462, 470 (Tex. App.—Houston [14th Dist.] 2015, no pet).

In *Le,* the court of appeals relied upon this Court's decision in *Plante v. State* in stating that the relevance of extraneous offenses to show intent is derived from the

"doctrine of chances," which concerns "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element [i.e. innocent intent] cannot explain them all." *Le,* 479 S.W.3d at 470 (citing *Plante v. State,* 692 S.W.2d 487, 491 (Tex. Crim. App. 1985)). In other words, evidence that the defendant had on other occasions committed similar offenses to the one he is charged with serves to reduce the possibility that the act in question was done with innocent intent. *Le,* 479 S.W.3d at 470-71 (citing *Plante,* 692 S.W.2d at 492; *Hudson v. State,* 112 S.W.3d 794, 803 (Tex. App.—Houston [14th Dist.] 2003, pet ref'd)).

The court of appeals in *Le* held that evidence that the defendant had at other times possessed marijuana was circumstantial evidence that he intentionally or knowingly possessed it on the date of the charged offense. It therefore had relevance beyond the question of character conformity and was admissible to rebut the defensive theory that the defendant did not have the requisite knowledge or intent. *Le,* 479 S.W.3d at 471. The court of appeals reaffirmed that extraneous-offense evidence is not inadmissible under Rule 404(b) when it is offered to rebut an affirmative defense or a defensive issue that negates one of the elements of the crime. *Le,* 479 S.W.3d at 470 (citing *De la Paz,* 279 S.W.3d at 343).

In this case, the appellant's two prior convictions for possession of cocaine with the intent to deliver were offered to rebut the appellant's defensive claims that

directly negated the elements of the charged offense. The State was permitted to introduce the appellant's prior convictions for possession of cocaine with the intent to deliver (1) in order to show that the appellant had knowledge of cocaine and (2) in order to rebut the defensive theory that the appellant was not involved in, and was in fact opposed to, the possession of cocaine with the intent deliver that was occurring in his own home.

In presenting extrinsic evidence of the appellant's prior convictions, the State was not required to introduce the details of the prior convictions in order to show their similarity to the charged offense.

In this case, the court of appeals repeatedly held that, upon introducing the appellant's two prior cocaine convictions into evidence, the State had to present the details of those two prior convictions in order to show their similarity to the facts and details of the charged offense. *See Lynch,* 612 S.W.3d at 611 ("the State did not introduce any associated testimony or details to demonstrate similarity between the circumstances of the prior convictions and the facts of the alleged offense."); *Lynch,* 612 S.W.3d at 612 ("the admission of pen packets stating only the two convictions, standing alone and without context, is unusually prejudicial."); *Lynch,* 612 S.W.3d at 614 ("Introducing the convictions, without details that would give the jury perspective as to whether they were similar to this situation or not, served little purpose other than to prove character conformity.").

The details of the appellant's prior cocaine convictions would be more prejudicial to the appellant than merely introducing the two prior judgments and indictments. Yet that is precisely what the court of appeals held. What took only a few seconds of the trial in this case would take an additional day or more of the trial court's time, as the State presented the facts of the appellant's prior convictions. Inexplicably, the court of appeals wanted the State present additional extraneous offenses in order to help the State prove the appellant's knowledge and intent.

For example, the court of appeals wanted the State to introduce evidence of "trash pulls" or "controlled buys" at the appellant's residence in order to help prove its case, apparently not recognizing this testimony would constitute extraneous-offense evidence, which the appellant certainly would challenge. *See Lynch,* 612 S.W.3d at 612. If this is the law in this state, it certainly should be a holding issued by this Court. The defense bar should be prepared for numerous additional extraneous offenses to be presented in narcotics cases, and trial courts and juries should be prepared for much lengthier trials as the State presents all of the numerous extraneous offenses committed by the typical narcotics defendant in order to help prove the defendant's knowledge or intent.

In support of its holding that, in a narcotics case, the State should prove the details of the defendant's prior narcotics cases in order to show their similarity to the charged offense, the court of appeals relied upon no decisions in any narcotics cases.

That is despite the fact that—as noted above—there is no shortage of decisions in narcotics cases in which the State introduced extraneous offenses to rebut the defendant's evidence of lack of knowledge or intent. Instead, the court of appeals cited to several victim-oriented decisions, in which the issues of intent and knowledge are very different from those issues in a narcotics case. *Lynch,* 612 S.W.3d at 611-12 (citing *Ford v. State,* 484 S.W.2d 727, 730 (Tex. Crim. App. 1972) (pre-rules murder case); *Smith v. State,* 420 S.W.3d 207, 220-22 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (murder); *Prince v. State,* 192 S.W.3d 49, 54-55 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (capital murder); *Johnson v. State,* 932 S.W.2d 296, 302-03 (Tex. App.—Austin 1996, pet. ref'd) (capital murder); *Blackwell v. State,* 193 S.W.3d 1, 14 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (indecency with a child); *Plante,* 692 S.W.2d at 491 (pre-rules theft case)).

This litany of cases does not appear to support the proposition advanced by the court appeals. For example, in *Smith v. State,* the court of appeals noted that, when extraneous-offense evidence is offered on the issue of intent (as opposed to identity), Texas courts hold there is less need to show significant similarity between the facts of the other incidents and those of the case being tried. *Smith,* 420 S.W.3d at 221 (citing *Johnson,* 932 S.W.2d at 302-03). The degree of similarity simply need not be as great if offered to prove the issue of intent. *Smith,* 420 S.W.3d at 221 (citing *Bishop v. State,* 869 S.W.2d 342, 346 (Tex. Crim. App. 1993); *Morrow v. State,* 735 S.W.2d 907, 909-10

(Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

In this case, the State introduced into evidence two of the appellant's prior convictions for possession of cocaine with the intent to deliver, as well as their accompanying indictments. In that respect, the two extraneous offenses were sufficiently similar to the charged offense to be relevant and admissible on the issues of the appellant's knowledge of cocaine and his intent to deliver cocaine. They were useful and relevant in rebutting Ms. Moreno's evidence that (1) the appellant had no knowledge or awareness of the cocaine in plain view in his own home, (2) the appellant did not know that Ms. Moreno was using and selling cocaine at his home, and (3) the appellant did not approve of Ms. Moreno using and selling cocaine in his home, so much so that she was forced to hide it from him.

The trial judge did not abuse her discretion in concluding that the probative value of the appellant's prior convictions was not substantially outweighed by the danger of unfair prejudice.

A trial judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. All testimony and physical evidence are likely to be prejudicial to one party or the other. It is only when there exists a

clear disparity between the degree of prejudice of the offered evidence and its probative value that Rule 403 is applicable. *Davis v. State,* 329 S.W.3d 798, 806 (Tex. Crim. App. 2011).

A Rule 403 balancing test includes the following factors:

> (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable—a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;
>
> (2) the potential that the other offense evidence has to impress the jury in some irrational but nevertheless indelible way;
>
> (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, *i.e.,* does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

De la Paz, 279 S.W.3d at 348-49.

First Factor

The appellant's two prior convictions for possession of cocaine with the intent to deliver offered strong—but rapid—evidence to rebut the extensive defensive

evidence that the appellant would have no knowledge or awareness of cocaine in his own residence, that the appellant would not know of the use and sale of cocaine in his own residence, and that the appellant would not approve of the use and sale of cocaine at his own residence. The first factor, therefore, weighs heavily in favor of finding the evidence was substantially more probative than prejudicial. *Le,* 479 S.W.3d at 471 (citing *Prince,* 192 S.W.2d at 50 (holding that probative value exceeded any unfair prejudicial effect where evidence rebutted defendant's defensive theory concerning lack of intent)).

Second Factor

There was little or no opportunity for the documentary evidence, redacted as it was by the trial judge (R.R. 4-25), to impress the jury in any irrational way.[4] The trial prosecutor in fact stated that he wanted to offer the documentary evidence in order to limit the effect that it might have on the jury. He did not want to get into the details of the extraneous offenses, so as not to encourage the jurors to direct their focus away from the charged offense (R.R. 4-22). The trial prosecutor urged the trial judge to provide a limiting instruction similar to that which the trial judge ultimately gave, and

[4] This is not a case in which the State offered the appellant's two prior convictions as substantive evidence in its case-in-chief, in the face of the defendant's offer to stipulate. *Cf. Old Chief v. United States,* 519 U.S. 172 (1997). In this case, the State offered the appellant's two prior convictions only as rebuttal evidence and for a limited purpose.

the appellant's trial attorney agreed with that suggestion (R.R. 4-26-27). After State's Exhibit # 60 was admitted into evidence, the trial judge instructed the jurors as follows:

> [T]hat evidence was offered by the State as rebuttal evidence to the Defendant's defensive theory of this case. This evidence may only be considered to show, if it does, the Defendant's intent, motive, opportunity, preparation, plan, absence of mistake or accident, or knowledge, if any.
>
> You may not consider this evidence unless you find and believe beyond a reasonable doubt that the Defendant committed these other acts, if any were committed. **This evidence may not be considered as character evidence of the Defendant; and it may not be used as evidence that on this particular occasion, the Defendant acted in accordance with that alleged character trait, if any.**

(R.R. 4-31-32) (emphasis added).

The trial judge provided the following additional instruction to the jurors in the court's final charge to the jury:

> The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, for the purpose of showing the defendant's motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident, if any. You cannot consider the testimony unless you find and believe beyond a reasonable doubt that the Defendant committed these acts, if any, were committed.

(C.R. 63-64; R.R. 4-37) (emphasis added).

The trial judge's limiting instructions clearly show that she admitted the evidence for its non-character-conformity purpose. *Powell,* 63 S.W.3d at 439 (citing

TEX. R. EVID. 105(a) (providing for limiting instruction when evidence is admissible for one purpose but not admissible for another)). *See also Richardson v. State,* 328 S.W.3d 61, 71-72 (Tex. App.—Fort Worth 2010, pet. ref'd); *McGregor v. State,* 394 S.W.3d 90, 120-21 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *Jabari v. State,* 273 S.W.3d 745, 753 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A court generally presumes that a jury followed a trial court's instruction regarding consideration of evidence. *Le,* 479 S.W.3d at 471-72 (citing *Thrift v. State,* 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *McGregor v. State,* 394 S.W.3d 90, 121 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (holding potential inference of character conformity was held in check by limiting instruction)).

However, in this case, the court of appeals weighed the trial judge's instructions against the admissibility of State's Exhibit # 60 because the trial judge's instructions "allowed the jury to use the extraneous offense information for more reasons than those for which the State sought to admit it." *Lynch,* 612 S.W.3d at 613. This is certainly true. But the court of appeals failed to acknowledge that the trial judge's instructions still limited the jury's consideration of State's Exhibit # 60, and the trial judge made it clear that the jurors could not consider the exhibit for an impermissible character-conformity purpose.

The trial judge's instructions properly limited the jury's reliance on the extraneous offense evidence to issues that the defense raised, specifically his intent

and his knowledge. The trial judge's instruction for the jury to consider the extraneous offenses for additional reasons as well amounted to surplusage that the jury could readily disregard because those issues were not pertinent to the trial. The trial judge's instruction specifically limited the extraneous-offense evidence to issues other than character conformity. Therefore, although not as narrowly tailored to the specific issues involved as they could have been, the instructions correctly instructed the jury to limit their use of the extraneous-offense evidence to issues that were properly before them—the appellant's knowledge and intent. *Blackwell,* 193 S.W.3d at 16. The jury here was adequately apprised that they could rely on the extraneous-offense evidence solely for other purposes than character-conformity evidence. *Blackwell,* 193 S.W.3d at 17.

The trial judge's limiting instructions about the appellant's two prior cocaine convictions minimized any risk the jury would consider the convictions for any improper purpose or give them undue weight. *Harris v. State,* 572 S.W.3d 325, 334 (Tex. App.—Austin 2019, no pet.) (citing *Taylor v. State,* 332 S.W.3d 483, 492 (Tex. Crim. App. 2011) (jury is presumed to understand and follow trial court's jury-charge instructions absent evidence to contrary); *Lane v. State,* 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (impermissible inference of character conformity can be minimized through limiting instruction)). The second factor weighs in favor of the admissibility of State's Exhibit # 60.

Third Factor

As already noted, the time that it took to introduce State's Exhibit # 60 into evidence was negligible—only a few moments. After that evidence was admitted, the jury heard the trial judge's oral limiting instruction and was then presented with the trial judge's charge to the jury, which focused the jurors upon the issues in the case and the State's burden of proof to prove the appellant of the charged offense beyond a reasonable doubt. The parties' closing arguments spent the bulk of their time focusing the jurors upon the facts of the case, including the evidence from Ms. Moreno. The third factor weighs in favor of the admissibility of State's Exhibit # 60.

Fourth Factor and Summary

There is no indication in this record that the State had better probative evidence available to rebut Ms. Moreno's evidence that the appellant did not know about the cocaine use, packaging, and delivery occurring at his residence. The State was required to prove that the appellant exercised care, control, and management over the cocaine, that he did so with the intent to deliver the cocaine, and that he knew that the substances in his residence were in fact cocaine. The trial prosecutor stated that the State had no way to rebut Ms. Moreno's testimony, except to present evidence of his prior narcotics convictions, which would show that it was much less likely that the appellant did not have the requisite intent and knowledge (R.R. 3-228).

The trial prosecutor noted that Ms. Moreno had negated every element of the offense that the State was required to prove (R.R. 4-5-6). The State's need for rebuttal evidence was great. *See De la Paz,* 279 S.W.3d at 349; *Le,* 479 S.W.3d at 472. The fourth factor weighs in favor of the admissibility of State's Exhibit # 60.

Considering the four factors together, the trial judge acted cautiously and within the zone of reasonable disagreement in determining that the probative value of State's Exhibit # 60 was not substantially outweighed by its prejudicial effect. *Le,* 479 S.W.3d at 472 (citing *Hammer v. State,* 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (Rule 403 envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value); *Conner v. State,* 67 S.W.3d 192, 202 (Tex. Crim. App. 2001) (same)). *See also Knight,* 457 S.W.3d at 204; *Swarb,* 125 S.W.3d at 683-84.

The court of appeals erred in holding that the trial judge abused her discretion in admitting into evidence two of the appellant's prior cocaine convictions in order to prove the appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, especially because Ms. Moreno claimed that the appellant had no knowledge or intent to commit the charged offense. The court of appeals also erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or intent in his current narcotics prosecution, the State must also show the details of the prior narcotics cases

in order to show their similarity to the charged offense. The State's first and second grounds for review should be sustained.

THIRD GROUND FOR REVIEW

The court of appeals erred in holding the appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more.

ARGUMENT AND AUTHORITIES

Standard of Review

In this case, the court of appeals held, "The strongest piece of evidence the State had against Lynch was that he had previously been convicted under similar statutes on two occasions." *Lynch,* 612 S.W.3d at 615. That holding is not supported by the record. The strongest evidence that the State had against the appellant was the several grams of cocaine on the appellant's dresser, coupled with the significant amount of cash, the knife containing crack cocaine, and the baggies used to package and sell crack cocaine—all in plain view in the appellant's own residence. The jury did not convict the appellant because the State introduced State's Exhibit #60 into evidence and briefly mentioned the exhibit in a couple of paragraphs of the State's

final jury argument that comprised several pages of the reporter's record.

The biggest problem with the harm analysis by the court of appeals is the court did nothing more than repeat it holdings on the merits:

- "the character of the erroneously admitted evidence was especially prejudicial." *Lynch,* 612 S.W.3d at 615.
- "The pen packets were official documents, leaving little room for interpretation by the jury." *Lynch,* 612 S.W.3d at 615.
- "The State's argument gave the jury the impression they could convict Lynch of being a drug dealer, generally." *Lynch,* 612 S.W.3d at 615.
- "Given that the extraneous-offense evidence was inherently prejudicial and possessed low probative value, and considering the record as a whole and the State's emphasis on the extraneous offense in closing argument, it **appears** the offenses were presented to improperly bolster the State's case." *Lynch,* 612 S.W.3d at 615-16 (emphasis added).

These quoted statements are the bulk of the harm analysis employed by the court of appeals. The court of appeals did nothing more than emphasize the holdings it reached in addressing the merits. That is not a harm analysis.

This Court should disregard any error on the part of the trial judge in introducing the appellant's two prior convictions into evidence because that evidence did not affect the appellant's substantial rights.

The allegedly erroneous admission of evidence is non-constitutional error. Non-constitutional errors are harmful, and thus require reversal, only if they affect the defendant's substantial rights. An error is reversible only when it has a substantial and injurious effect or influence in determine the jury's verdict. If an appellate court has a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect, the court should not overturn the conviction. *Gonzalez,* 544 S.W.3d at 373. *See* TEX. R. APP. P. 44.2(b) (Any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

In assessing the likelihood that the jury's decision was improperly influenced, an appellate court must consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. The reviewing court may also consider the jury instructions given by the trial judge, the State's theory of the case, defensive theories, closing arguments, voir dire, and whether the State emphasized the error. *Barshaw v. State,* 342 S.W.3d 91, 94 (Tex. Crim. App. 2011).

In conducting a harm analysis, an appellate court should consider: (1) the

character of the alleged error and how it might be considered in connection with other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4) whether the State emphasized the complained of error. *Gonzalez,* 544 S.W.3d at 373. In this case, the court of appeals did not appear to undertake an application of these factors, applying perhaps only the last one. The State contends that the harm analysis conducted by the court of appeals was inadequate and erroneous.

First Factor

State's Exhibit # 60 was a brief part of the State's case against the appellant, and it was introduced into evidence only in rebuttal after the appellant had rested. The trial judge instructed the jurors that they could consider the exhibit only if it helped to show the appellant's intent, knowledge, and absence of mistake or accident, among others. The jurors were specifically instructed that they could not consider the exhibit as character evidence and could not use the exhibit to determine whether, with regard to the charged offense, the appellant acted in accordance with any particular character trait. *See Davis v. State,* 581 S.W.3d 885, 894 (Tex. App.—Dallas 2019, pet. ref'd) (broad limiting instruction was sufficient to prevent the defendant from being harmed); *James v. State,* 555 S.W.3d 254, 262 (Tex. App.—Texarkana 2018, pet. dism'd) (brief portion of prosecutor's final argument was not sufficient to harm defendant).

There is no indication in this record that the jurors disobeyed the trial judge's instructions. *See Davis,* 581 S.W.3d at 894.

Second and Third Factor

The appellant's one-bedroom apartment was very small, and most—if not all—of the significant amount of cocaine recovered from the residence was found in plain view. There may have been some doubt as to how many of the four occupants of the residence actually lived there, but there was no doubt that the appellant was the primary resident. The officers' six-month investigation of the residence revealed that the appellant was the primary, if not sole, resident. All of the paperwork in the residence belonged to the appellant at that particular address. Most of the several prescription bottles belonged to the appellant, and the only two photographs in the residence depicted the appellant.

One of the cell phones in the residence belonged to the appellant, and it had cocaine on top of it. There was also a significant amount of cash, a crack cocaine knife, and narcotics baggies in plain view. All of this evidence was on top of or near the appellant's dresser. All of this evidence is why the jury convicted the appellant—not two prior convictions from 2006. *See Gonzales,* 544 S.W.3d at 373-74 (allegedly erroneous drug evidence comprised only five pages of State's thirty-two page cross-examination, and it was not the focus of the State's case).

Fourth Factor

In her final argument to the jury, the trial prosecutor spent the bulk of her time reminding the jurors of the evidence recovered from the appellant's residence and challenging the credibility of the evidence from Ms. Moreno. The trial prosecutor argued that the key issues raised by the evidence from Ms. Moreno were "knowledge and intent." (R.R. 4-59-60). The trial prosecutor made it clear that State's Exhibit # 60 was introduced into evidence solely to rebut the evidence from Ms. Moreno that the appellant "had no knowledge, no intent. He wouldn't go for that. Pretty much, he's a saint. He doesn't want any of that in his house." (R.R. 4-62).

Contrary to that which was stated by the court of appeals, the trial prosecutor was not arguing that the jurors should find the appellant guilty of the charged offense because he was convicted of that offense on two occasions in the past. *Cf. Lynch,* 612 S.W.3d at 613. The trial prosecutor was clearly arguing that the jurors should consider the appellant's two prior cocaine convictions as rebuttal to Ms. Moreno's evidence that the appellant had no knowledge or intent to commit the charged offense.

In its first two grounds for review, the State believes that it has more than sufficiently demonstrated that State's Exhibit # 60 was admissible to rebut the defensive evidence provided by Ms. Moreno. Nevertheless, that rebuttal evidence was certainly not the reason that the jury found the appellant guilty. This Court should disregard any error on the part of the trial judge in admitting State's Exhibit # 60

because it did not affect the appellant's substantial rights. The court of appeals erred in holding the appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more. The State's third ground for review should be sustained.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State prays that this Court will reverse the judgment of the court of appeals and remand the case to the court of appeals for consideration of the appellant's unaddressed issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Attorney for the State certifies a copy of the foregoing brief was sent via email, eFile service, to Joel Bennett, attorney for Charles Lynch, at joel@searsandbennett.com, on March 22, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned Attorney for the State certifies this brief is computer generated, and consists of 14,066 words.

/s/ Alan Curry
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